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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

Nos. 547, 548

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FOOTE BROTHERS GEAR & MACHINE CORPORATION.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INDEPENDENT UNION OF GEAR WORKERS.

ANSWER TO PETITIONS FOR WRITS OF CERTIORARI AND OPPOSITION TO MOTION TO REVERSE WITHOUT ORAL ARGUMENT.

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STATEMENT.

The Board's application seems to be for writs of certiorari and, in the event the writs are granted, then that the causes be considered and reversed without oral argument. The motion as to what action should be taken if the writs should be granted is, of course, premature. Our position is that the writs of certiorari should

be denied, but if granted then the cause should follow the usual course of full briefs and oral argument. We submit that there would be no authority warranting the novel procedure which the Board suggests of granting certiorari and then finally determining the case in this court on nothing more than a petition for certiorari and answers thereto without briefs in full and without oral argument.

We address ourselves to the petition for certiorari:

Without even claiming that the Circuit Court of Appeals has decided a question which merits review for any of the reasons enumerated in Rule 38 (5) of this Court, the National Labor Relations Board has requested the Court to review and reverse, without oral argument, a decision of the Circuit Court of Appeals for the Seventh Circuit.[1]

Questions Presented.

The petition for certiorari is based upon two grounds:

(1) It is claimed that although the Circuit Court of Appeals had before it the full and complete record of the National Labor Relations Board, and although it entered an order (R. 1019) allowing the Board to print that record *in haec verba* in full if it wished, nevertheless the Court's decision may be cast aside as *nullo bono* simply because it did not require the petitioner for review to print the entire record verbatim. In the Circuit Court of Appeals the Board did not avail itself of its broad printing privilege. It printed, as an appendix to its

[1] *Printing of Record on this Petition:* Believing, as we do, that it was the intent of Congress that the National Labor Relations Act, through administrative procedure, furnish a prompt, inexpensive and effective settlement of labor disputes leading to interruptions of interstate commerce, we do not oppose the Board's motion to dispense with printing of the question and answer record in this Court. Actually the record has been fully made up and no further printing is required.

brief, only a portion of the pleadings. Employer printed the complete pleadings and printed all of the evidence in narrative form except where questions and answers were required in order not to disturb the sense of the testimony.

(2) It is asserted that the Board's findings, which were analyzed and discarded by the Circuit Court of Appeals, nevertheless were supported by substantial evidence. In support of this assertion, the petition for certiorari adopts the improbable and discredited claims of two members of the National Labor Relations Board rather than attempting a genuine analysis of the record to show that those conclusions were buttressed by evidence.

REASONS FOR DENIAL OF THE WRIT.

I.

THE NATIONAL LABOR RELATIONS ACT DOES NOT ATTEMPT TO PRESCRIBE THE DETAILS OF COURT PROCEDURE UPON REVIEW. THE ACT REQUIRES THE COURT TO HAVE BEFORE IT, AND BASE ITS DECISION UPON, THE FULL RECORD UPON WHICH THE BOARD ACTED. BUT THE ACT LEAVES IT TO THE COURT TO DETERMINE HOW MUCH, IF ANY, OF THAT RECORD NEED BE PRINTED AND IN WHAT MANNER THE PRINTING SHALL BE ORDERED.

If the members of the Congress who passed the Wagner Act were to be told that they had passed a law requiring an employer who desired a review of a Labor Board ruling to print *in extenso* the question and answer transcript of the proceedings before the Board, we believe they would be aghast.

It was the intention of Congress to provide by law for the definite establishment of certain rights of employees; to vest the enforcement of those rights in an administrative tribunal which might proceed for their enforcement with directness, expedition and a minimum of technical obfuscation; further, the spirit of administrative procedure is that the Courts shall review the administrative proceeding with a minimum of technicality and expense.

In this case, in answer to the employer's petition for review, the Board, after motion by the employer (R. 1022), filed a full and complete typewritten transcript of all its proceedings. The Circuit Court of Appeals permitted the employer to print a narrative of the evidence therein contained and told the Board that if that

narrative was insufficient it could print such portions of the question and answer transcript as it wished (R. 1019).[2]

This order was so broad that the Board, if it wished, could have printed the entire question and answer transcript of the evidence. It did not do so. The assertion of the Petition for Certiorari (p. 16) that the Court "denied to the Board leave to *substitute* testimony in question and answer form for any part of the narrative" **is directly contrary to the record** (R. 1019). See the Courts order set forth as footnote 2, *supra*. The Board made a *second* motion for leave to print—this was denied, presumably because the Board already had such leave.[3]

Nor did the Board show that the narrative, nor does

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[2] "It is ordered that leave be, and it is hereby, granted: to petitioner (the employer) to print as a part of the record in this Court its prepared narrative of the evidence in lieu of printing the question and answer transcript of the hearings herein; to respondent (the National Labor Relations Board), if it deems the said narrative deficient in any instances, to correct such believed insufficiencies by printing in such instances as an appendix to its brief the questions and answers." (Portions in parenthesis inserted.)

[3] A resumé of the motions and orders on the whole subject is:

Dec. 15, 1939—Motion by employer to print as appendix to its brief or as part of record its prepared narrative with leave to Board to correct any believed insufficiencies by printing questions and answers (R. 1027-1029).

Dec. 26, 1939—Objections of Board to above motion (R. 1030).

Dec. 26, 1939—Reply to objections (R. 1033).

Jan. 18, 1940—Order permitting narrative, set forth in Note 2, *supra* (R. 1019).

March 15, 1940—Stipulation that the record as certified by the Board *"and the summary thereof"* should stand in the consolidated cases (R. 1051).

April 25, 1940—Motion of Board to strike from files entire printed transcript including narrative (R. 1036).

April 25, 1940—Motion of Board that employer print (a) such portions of testimony as it desired court to read in question and answer form or (b) print entire transcript, or (c) granting leave to print entire transcript (R. 1034).

April 26, 1940—Answer to above motions (R. 1045).

May 1, 1940—Order denying motions of April 25 (R. 1048).

it now show that even the portions of the narrative which the Court cited in its opinion, were incorrect. Instead it waited for over three months and then, on the eve of the hearing in the Circuit Court of Appeals, moved (R. 1036) to throw out this entire narrative, printed at considerable expense (R. 1045-6).

The Board now appears to urge in legal effect that the Labor Relations Act permits no court review except by a printing of the *full* question and answer transcript of the Labor Board. The Board asserts (Pet. 13-14) that the Act requires a review by the Circuit Court of Appeals upon the identical, viz., the question and answer, transcript that was before the National Labor Relations Board.

There can be no middle ground. Either the Act is as construed by the Board and requires not only a *filing* for the purpose of jurisdiction, but a *printing*, as the Board asserts, of the entire question and answer transcript; or the Act requires only a filing of the entire transcript and leaves it to the judgment and wisdom of the courts in their respective local practices to require the printing of such portions of the record and in such manner as they see fit. We assert the latter proposition and submit that there is nothing in the Act attempting to control the internal details of federal appellate procedure.

We submit that the jurisdiction of the Circuit Court of Appeals, and of this Court, to review the Board's proceedings is based upon the original certified transcript filed by the Board; that what is printed or not printed in any particular court is a matter for that particular court to determine within its own rules and discretion—it is not a jurisdictional matter.

As a matter of actual fact apart from legal theory, the Board has never contended and, as we understand it,

does not now contend, that we were required to *print* the *entire* question and answer transcript. Once the tacit admission there involved is made, it destroys the whole theory that the Act requires a *printing* of the full question and answer transcript in the Circuit Court of Appeals. It admits that it is within the discretion of the reviewing court to require only the printing of such portions, and in such manner, as the reviewing court believes convenient for its analysis of the issues.

The Board itself, in its motion of April 25, 1940 (R. 1034) in the Circuit Court of Appeals, asked as its first request only that the employer print "such *portions* of said transcript, including such portions of the testimony in question and answer form, as they desire the Court to read," thereby admitting that there was no statutory requirement of the Congress that the entire question and answer transcript or any particular portion thereof be printed.

This particular case presented a particular problem, viz., it was appealed to the Circuit Court of Appeals for the Seventh Circuit before the adoption of that Court's present rules, which require a printing in question and answer form of certain portions of a transcript. The Court dealt with it as a case standing on its own feet. Because the employer had prepared a narrative of the evidence in the form commonly used in the Seventh Circuit before the adoption of the present rules, it permitted the filing and use of such narrative. But, in its order of January 18, 1940 (Tr. 1019) the Circuit Court of Appeals was careful to preserve to the Board the right to print each and every, in fact the entire, question and answer transcript if it believed necessary.

The Board never printed a thing but certain formal pleadings in the Circuit Court of Appeals. On the con-

trary, *it stipulated that the record to be prepared under the order just referred to "and the summary thereof"* should be used in both the consolidated cases (R. 1051).

And now, without showing that the narrative which was presented was either inaccurate or insufficient; without availing itself of its opportunity to print any or all of the evidence in the Circuit Court of Appeals; without showing that the portions of the narrative which the Circuit Court of Appeals referred to in its opinion were inaccurate; without ever moving to vacate the Circuit Court of Appeals order allowing a narrative but on the contrary permitting the employer to expend over $2000 in reliance thereon; without asking relief from its stipulation to use this "summary"; the Board asks this Court to require the process of review to start over again. If that is within the spirit of administrative law or within the intent of the Wagner Act, we are greatly mistaken. Further, we assert that the Board is estopped by its own conduct.

Nor will the Board's assertions that this case establishes a precedent for any other case avail it. The rules of the Circuit Court of Appeals for the Seventh Circuit have been changed since this case was filed. The narrative had been prepared under the old practice (R. 1027-1029). Procedurally, this case stands on its own feet. Nor can any other case stand on those feet.

The hollowness and insincerity of the Board's complaints about the narrative system is apparent by contrasting the Board's own internal procedure with its contentions in Court. It must never be forgotten that the Board itself is under the statutory mandate of acting only "upon all the testimony taken" (Sec. 10 c). But within the confines of its own quarters the Board does not insist that all the evidence be presented to it either in question and answer or narrative form.

We set forth in the margin[4] the system used by the Board as testified to by Mr. Abraham J. Harris, a supervisor in the Review Section of the Board (Verbatim Record of Proceedings of House Committee Investigating Labor Board, Vol. II, p. 265).

Thus the Board acts on the strength of the analysis and summary of the testimony made by others and defends its right so to do,[5] yet objects to the court using, not "analyzed" or "organized" statements of the evidence, but *all the testimony*, only in narrative, rather than question and answer form. Yet the requirement of the Act

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[4] "It would be a physical impossibility for the members of the National Labor Relations Board, or for the members of any board or commission, to examine personally every page of all this testimony, and every exhibit, and to analyze it personally, and as in every administrative agency, the work of reviewing this material has been turned over to a Review Section. The Review Section serves the function of enabling the Board to do its work so far as decision making is concerned. A review attorney reads the transcript, examines the exhibits, he *considers* the matter, *analyzes* it and is able to present to the Board, as the *result of his work, a statement of what the evidence is*, and he is able to present it to the Board in *an organized* form.

"Now, every one who has had to do with the trial of a case knows that the trial of a case is not put in always in an orderly way. One witness gets on the stand and tells parts of the story, the next witness tells other parts of the story. They don't get on the stand and tell one continuous story, and when the case is presented to the Board, the Board is enabled to see the case as a whole, is able to see the relationship between what one witness said and what another witness said, *without the necessity of reading what these witnesses have said in an unorganized fashion.*"

[5] Contrast the Board's present demand that this court read the complete question and answer transcript with its successful defense, in *Inland Steel Co.* v. *N. L. R. B.*, 105 F. (2d) 246, of its own practice not to do so. Contrast also with the Board's contentions in *N. L. R. B.* v. *Cherry Cotton Mills*, 98 F. (2d) 444, 447 ("admission in argument that the Board has made use of a Review Division"). See also *N. L. R. B.* v. *Biles-Coleman L. Co.*, 98 F. (2d) 16, 17.

For further amplification of the Board's system of relying on oral and written summaries of evidence see testimony given by members of the Review Division appearing in Verbatim Record of Proceedings of House Committee Investigating Labor Board, Vol. I, pp. 382-3, 437; Vol. II, pp. 234-5, 273, 298-9, 335.

(Sec. 10 c) is that the Board, as much as the courts, act "upon all the testimony taken."

We do not believe that it is material academically to examine the merits of the question and answer and narrative forms of record. But if it be asserted that there is no merit in the narrative form of review, we call attention to old *Rule 8 of this Court which forbade any other form of printed transcript* than the narrative form, and present Rule 8 which authorizes it.

II.

THE FINDINGS OF THE BOARD WERE NOT BASED ON SUBSTANTIAL EVIDENCE.

As Point II of its reasons for review, the Board asserts that the Board's "subsidiary" findings are based upon substantial and, in considerable part, uncontradicted evidence. With that statement we disagree most emphatically.

The petition for certiorari asserts that the majority of the Circuit Court of Appeals for the Seventh Circuit has continued to apply the "technique of review" described in the Board's petition in the *Link Belt* cases. We have not had the privilege of seeing the Board's petition for certiorari in the *Link Belt* cases, and therefore are under a handicap in answering this obscure argument.

The fact is that the petition for certiorari is based upon verbatim acceptance of the incongruous findings of the Board. The effect is of saying to this Court, the Board found so and so, while the Court found thus and thus. No independent analysis of the record is attempted.

We respectfully submit that the process of certiorari is not open to those who assert merely that the finding of a court is contrary to that of an administrative agency, and therefore presumptively must be incorrect. Unless the

petition for certiorari by page and record can presumptively demonstrate that the findings of the Court are erroneous, and further that the findings of the Board were supported by substantial evidence, it should not be allowed. Otherwise, every case could be reviewed in this Court. It will not do to cite merely the conclusions, correct or incorrect, of the administrative agency. The statement of those conclusions begs the question, which is, were those conclusions supported by substantial evidence?

It is a notorious fact that this particular agency, the National Labor Relations Board, discredited by Congress and the Smith Committee, and none of whose members the President has seen fit, on their records, to reappoint, has been unfair in its fact finding policy. We respectfully submit that it does not lie in the mouth of such an agency to claim this Court's powers of extraordinary review by merely citing the agency's conclusions as opposed to those of a Court whose conscientious members have, over a period of years, enjoyed the confidence of the bar which practices before them.

Manifestly it would be impossible to examine the full record on this petition—nor should it be necessary, inasmuch as the Circuit Court of Appeals decision is presumptively correct. We respectfully submit that a reading of the Court's opinion (R. 1053, *et seq.*) shows that it considered the case carefully, dispassionately and with scrupulous regard for the limitations on its powers of review. Rather than showing that the Court overlooked either evidence or Board theories its demonstrates exactly the contrary.

As examples we touch below on five topics to demonstrate that the Record is quite different from the Board's decision of which the Petition is but a substantial paraphrase:

1. *Dissolution of Old Plan:* The petition for certiorari would make it appear that because the dissolution of the

Old Plan was not accomplished by plant-wide bulletins that it was kept more or less secret. On the contrary, the evidence showed without dispute that the men knew the Old Plan "was out" (R. 277); "was illegal" (R. 463); no more meetings because "it isn't legal" (R. 465). There is not a shred of evidence that the men (highly skilled, intelligent machinists) did not understand exactly their position and their rights.

2. *Solicitation for memberships:* The Board found that the Independent "drive" was "unconcealed and with full knowledge" of employer (R. 934). The Board wholly ignored the solicitation on company time by competing organizations. Nevertheless it is agreed that no inference of company support of any particular organization is involved where all trespass alike on the employers' time (R. 500. Cf. *Matter of American Smelting & Refining Co.*, 7 N. L. R. B. 735, 740). The Court found that "the S. T. B. A., the Amalgamated, and the Independent, all solicited * * * during working hours * * *. The foremen knew that this was going on, and, upon orders from the management, tried to stop soliciting * * * regardless of the organization concerned" (R. 1061-2). What was done on company time was done furtively (R. 278-9, 285, 286, 419, 487, 488, 492, 494). Not one instance was shown where membership in the Independent was solicited in the presence of a foreman. The A. F. of L. and C. I. O. supporters campaigned in the office (R. 232, 235, 316, 427, 440, 444, 448, 449, 450, 457, 467); the C. I. O. adherents did the same in the shop (R. 437, 438, 499, 501, 503). Foreman Schuessler found an Independent solicitor out of his department; he chased him out (R. 487); he treated a C. I. O. solicitor the same way (R. 487-8).

3. *The "systematic" questioning re S. T. B. A.:* Actually involved but five instances, all fully narrated in the court's opinion (R. 1062). In not one of the instances did the Board find that anything hostile to a union was said. (Note that although the Board recited (R. 930) both Rakowski's

and Fowler's version of their talk it refused to make a finding thereon.) In not one of the instances did those questioned disclose any confidential information and in no case was the matter pressed further (R. 478). All continued their memberships and activities unaffected by the questioning—the questioning was proved *as a fact* not to have interfered with them in the slightest; nor with anyone else because they didn't tell about it (R. 294, 478). Nevertheless the Board stated that this "attempt to elicit information * * * *necessarily* would intimidate" (R. 930). That is a *conclusion or opinion* rather than a finding of fact, and as such it is directly contrary to the undisputed evidence that no one was, in fact, intimidated. (Cf. *N. L. R. B.* v. *Express Publishing Co.*, C. C. A. 5, 111 F. (2d) 588, 590.)

4. *The "Refusal" to bargain with S. T. B. A.:* Actually not in issue because not alleged. The complaint alleged only a refusal to bargain with the U. O. P. W. (See Intermediate Report, R. 789) of which there was not even a claim of proof. But the record shows without dispute employer prepared and presented extensive written counter-proposals to the S. T. B. A. (Bd. Ex. 10, R. 641). When the independent came into picture, employer suggested S. T. B. A. get "classification" (as to bargaining units) order from Board (R. 141, 509, 576) and proposed to continue negotiations with it if it got such a "classification" order (R. 576).

5. *The Asserted "Hasty" Recognition of Independent:* The Board and the Petition for Certiorari seek to create the impression that the employer "hastily" recognized the Independent but delayed the S. T. B. A. The fact is that when the S. T. B. A. approached employer it came in with an extensive contract containing sweeping terms —it was the type of document that cannot be entered into overnight. As a matter of fact bargaining on the Independent's contract took over two weeks. But when the

Independent came in for recognition it came in on the single, naked question of recognition—a matter on which the law has left the employer no discretion and no right to bargain. Even so the Independent was not recognized until it had indisputably proved its majority and until the president of the company had obtained consents from a majority of his directors. And then the recognition agreement was carefully drawn to include the proviso from Section 9 (a) of that Act that "any individual employee or group of employees shall have the right at any time to present grievances" (Bd. Ex. 13, R. 509, 518). That was not the act of an employer trying to force its men into an organization.

Additional Reasons Why Writ Should Be Denied.

1. The Board's decision is improper in form, inasmuch as it does not contain clear-cut findings of fact.

2. The charges upon which the Board proceeded failed to comply with the Board's rules, hence the complaints were beyond the Board's jurisdiction.

3. The Board is barred by delay and laches.

4. The complaint alleged that employer failed to bargain with the U. O. P. W.—the Board's order was based on findings of failure to bargain with the S. T. B. A.

5. The Board had no jurisdiction to order refund of check-offed dues.

6. The Board, at the time in question, having failed to provide by rules any system whereby an employer could invoke its services to determine bargaining units cannot complain of the employer's selection of a bargaining unit so long as reasonably sound, even though different from the bargaining structure subsequently determined by the Board.

III.

THE BOARD'S MOTIONS.

Together with its petition for certiorari the Board asks that:

(a) That in the event certiorari be granted that the Court determine, apparently, the entire procedural merits of the case, without oral argument: To this unusual request we most emphatically object.

(b) The Board asks to dispense with the printing of the question and answer transcript: In this we concur. The record should be as it now stands. However, if the Board wants the Court to consider the full question and answer transcript and the Court feels it should undertake that task, it necessarily must be printed in order to furnish sufficient copies.

CONCLUSION.

We respectfully request that certiorari be denied.

Respectfully submitted,

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November 20, 1940.